

No. 85-1277

Supreme Court. U.S.

FILED

JUL 12 1985

JOSEPH E. MANOL, JR.  
CLERK

IN THE  
**Supreme Court of the United States**

October Term, 1985

The School Board of Nassau County,  
Florida, et al.,  
Petitioners,

v.

Gene H. Arline,  
Respondent.

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

BRIEF OF  
NATIONAL SCHOOL BOARDS ASSOCIATION  
AS AMICUS CURIAE SUPPORTING PETITIONERS

GWENDOLYN H. GREGORY  
Counsel of Record

Deputy General Counsel  
National School Boards Association  
1680 Duke Street  
Alexandria, Virginia 22314  
(703) 838-6712

AUGUST W. STEINHILBER  
NSBA Associate Executive Director  
and General Counsel

THOMAS A. SHANNON  
NSBA Executive Director

## TABLE OF CONTENTS

INTEREST OF <u>AMICUS CURIAE</u> .....	2
ISSUES PRESENTED FOR REVIEW.....	3
ARGUMENT.....	3
I. INTRODUCTION.....	3
II. TUBERCULOSIS IS A HANDICAP UNDER SECTION 504.....	7
III. INFECTIOUSNESS OF THE EMPLOYEE'S DISEASE IS A LEGITIMATE JOB DISQUALIFICATION.....	14
A. An employer may con- sider an individual's physical health in determining whether the person is qualified for a position.....	14
B. An employer may consider whether a per- son's disease will endanger others in determining whether the person is qualified for the position.....	21
IV. COURTS AND LAWMAKERS RECOGNIZE LIMITATIONS ON THE ADMISSION TO PUBLIC	

SCHOOLS OF STUDENTS AND EMPLOYEES WITH COMMUNICABLE DISEASES.....	27
A. State laws regulate the presence of persons with communi- cable diseases in the public schools.....	27
B. Courts consider infectivity of the disease in Section 504 cases involving students with communicable diseases....	32
V. REASONABLE ACCOMMODATION, IF AUTHORIZED AT ALL BY SECTION 504, DOES NOT REQUIRE AN EMPLOYER TO PLACE IN ANOTHER POSI- TION, A PERSON UNQUALIFIED FOR HIS/HER CURRENT POSITION..	37
VI. ALLOWING A PERSON WITH A CONTAGIOUS DISEASE TO REMAIN IN THE CLASSROOM SUBJECTS A SCHOOL DISTRICT TO POTENTIAL TORT LIABILITY.....	47
VII. CONCLUSION.....	49
VIII. APPENDIX.....	53

## TABLE OF AUTHORITIES

CASES:	PAGE
<u>Ambach v. Norwick</u> , ..... 441 U.S. 68 (1979).	15
<u>Arline v. School Boards</u> ..... of Nassau County, 772 F.2d 759, 760 (11th Cir. 1985).	8
<u>Bang v. Independent School</u> ..... District No. 27, 225 N.W. 499 (1929).	49
<u>Board of Trustees v. Porini</u> , ..... 263 Cal. App.2d 784 (1968).	30
<u>Earle v. Kuklo</u> , 98 A.2d 1097 ..... (N.H. App. Div. 1953).	48
<u>Ely v. Howard County Board</u> ..... of Education, 3 E.H.L.R. 553:288 (D. Md. 1982).	33
<u>Gilbert v. Hoffman</u> , ..... 23 N.W. 632 (Iowa 1885).	48
<u>King-Smith v. Aaron</u> , ..... 455 F.2d 378 (3rd Cir. 1975).	30
<u>Kleigel v. Aitken</u> , 69 N.W. .... 67 (Wisc. 1896).	48
<u>McCarthy v. Philadelphia</u> ..... Civil Service Commission, 424 U.S. 645 (1976).	15

<u>New York State Assn. for</u> .....	32,33
<u>Retarded Children,</u>	
<u>Inc. v. Carey, 466 F.</u>	
<u>Supp. 479 (E.D.N.Y. 1978).</u>	
<u>School Board of Nassau</u> .....	8
<u>County v. Arline,</u>	
<u>408 So.2d 706 (D.Ct.</u>	
<u>App. Fla. 1982).</u>	
<u>Southeastern Community</u> ...	16,17,39,40,41
<u>College v. Davis,</u>	
<u>442 U.S. 403 (1979).</u>	

## STATUTES:

### Federal

29 U.S.C. §706(7)(B) .....	21
Section 501 of the .....	22,45
Rehabilitation Act of 1973,	
29 U.S.C. §791.	
Section 503 of the .....	18,38,40,41,51
Rehabilitation Act of	
1973, 29 U.S.C §793(a).	
Section 504 of the .....	passim
Rehabilitation Act of 1973,.	
29 U.S.C. §794.	
Title VI of the Civil Rights .....	4,5
Act of 1964,	
42 U.S.C. 2000(d).	
Title IX of the Education .....	5
Amendments of 1972, 20 U.S.C.	
1681 <u>et seq.</u>	

### State

Alaska Stat. §18.15.145 .....	30
Ariz.Rev.Stat.Ann. ....	28
§§36.621 <u>et seq</u>	
Ark.Stat.Ann. §80-1210 .....	31
Cal. Educ.Code §§44839, 49406 .....	30,31
Conn.Gen.Stat. §10-207 .....	30
D.C. Code Ann. §6-119 .....	28
Mass.Gen.Laws Ann. ch.71, §55A .....	30
Me.Rev.Stat.Ann. tit.20A, §6551 ...	30,31
Mont.Rev.Code Ann. ....	28,30
§§20-4-106(b), 40-5-403	
Neb.Rev.Stat. §79-1247.06 .....	30
Nev.Rev.Stat. §391.312(f) .....	31
N.M.Stat.Ann. §22-10-10 .....	30
N.Y. Pub. Health §225(5)(h).....	27
Or.Rev. Stat. §433.267.....	28
Pa. Stat.Ann. tit.24, .....	30
§12-1209	
Utah Code Ann. §53-2-25 .....	31
Va. Code §22.1-270.....	28
W.Va.Code §16-3-4a .....	31

## REGULATIONS

29 C.F.R. §16134.702(f) .....	23,46
34 C.F.R. §104.12(b).....	43
34 C.F.R. §104.14(c) .....	18
34 C.F.R. §104, App. A, .....	20
subpart A, section 4.	
34 C.F.R. § 104, App. A, .....	39,44
subpart B, section 16.	
34 C.F.R. § 104, App. A, .....	22
subpart B, section 18.	
41 C.F.R. §60-741.6(c) .....	19,44

## OTHER AUTHORITIES:

<u>Application of Section 504</u> .....	11,12
<u>of the Rehabilitation Act</u>	
<u>to Persons with AIDS,</u>	
<u>AIDS-Related Complex, or</u>	
<u>Infection with the AIDS Virus,</u>	
Memorandum for Ronald E.	
Robertson, General Counsel for	
the Department of Health and	
Human Services, June 23, 1986.	
<u>Infectiousness of Tuberculosis, ...</u>	51
American Review of Respiratory	
Disease, Vol. 96, No. 4,	
October 1967.	
<u>Tuberculosis, Department of</u> .....	24,25
Health, Education and	
Welfare, Public Health	
Service/Center for	

## Disease Control.

Valente, <u>Education Law</u> .....	29
<u>Public and Private</u> 234 (1985).	

No. 85-1277

IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1985

---

The School Board of Nassau County,  
Florida et al, Petitioners,

v.

Gene H. Arline, Respondent.

---

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

---

BRIEF OF  
NATIONAL SCHOOL BOARDS ASSOCIATION  
AS AMICUS CURIAE SUPPORTING PETITIONERS

---

This brief amicus curiae in support of Petitioners is submitted with the written consents of counsel to all parties. Letters of consent are on file with the Clerk of the Court.

### INTEREST OF AMICUS CURIAE

Amicus curiae, National School Boards Association (NSBA), is a nonprofit federation of this nation's fifty state school boards associations, the District of Columbia school board and the Virgin Islands. Established in 1940, NSBA is the only major national educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

The individuals who compose this nation's school boards are elected or appointed community representatives, most of whom are not professional educators. They are responsible under state law for the fiscal management, staffing, continuity and educational productivity of

the public schools as well as for the health and safety of students and employees while inside the public schools within their jurisdictions.

### ISSUES PRESENTED FOR REVIEW

1. Whether the contagious, infectious disease of tuberculosis constitutes a handicap within the meaning of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 701, et.seq.

2. Whether one who is afflicted with the contagious, infectious disease of tuberculosis is precluded from being "otherwise qualified" for the job of elementary-school teacher, within the meaning of Section 504, 29 U.S.C. 794.

### ARGUMENT

#### I. INTRODUCTION

The decision below errs in at least two regards. First, it fails to recognize



that health considerations are equally appropriate as those involving academics and experience in making employment decisions. Second, the decision errs in its requirement that the school board must consider other positions for Ms. Arline as a "reasonable accommodation" to her handicap.

Section 504 is a non-discrimination statute designed to assure that employers evaluate handicapped persons on the basis of characteristics relevant to the position for which they are being considered. The statute prohibits discrimination against "otherwise qualified" handicapped individuals in federally assisted programs or activities. The statute is patterned after similar laws protecting minorities (title VI of the Civil Rights Act of 1964, 42 U.S.C.

2000(d)) and women in education (title IX of the Education Amendments of 1972, 20 U.S.C. 1681 et seq).

The purpose of Section 504 is to protect handicapped persons from unreasoned employer action based on prejudices resulting from fears and biases of the public regarding disabilities or diseases.

The National School Boards Association supports the law and the intent of its makers.

However, Amicus submits that Congress did not intend Section 504 to require an employer to ignore the handicap of an employee or job applicant. Here the metaphor drawn on the model of racial discrimination is not applicable. Whereas race would rarely, if ever, be a relevant basis for determining whether one is



qualified for a position, a handicapping condition - or the results of the handicapping condition - may be very relevant to the ability of the employee to carry out the duties of the job in a safe manner.

Employment criteria, particularly in the context of the public schools, include more than the technical educational and experience requirements. The criteria also include the ability to supervise children and a classroom in a safe manner. Indeed, the failure to provide such supervision could subject the school district to liability in tort.

The "reasonable accommodation" requirement, if valid at all, is appropriate only to the limited extent of requiring an employer to make minor changes in work schedules, location of the

work station, etc. Certainly nothing in the legislation authorizes the Department or a court to require an employer to ignore a legitimate job criterion or to create a new position for a handicapped employee who does not meet the qualifications of another position.

## II. TUBERCULOSIS IS A "HANDICAP" UNDER SECTION 504

The district court below held that, although Ms. Arline "suffers from a handicap...it's difficult for this court to believe that Congress intended contagious diseases to be included within the definition of a handicapped person..." under Section 504. The court of appeals disagreed and went farther to hold that, if indeed Ms Arline is found on remand not to be "otherwise qualified" for the position of elementary-school teacher, the district must seek other means to

"reasonably accommodate" her lack of qualification by attempting to find another position for her in the school district.

It should be noted that the court of appeals incorrectly stated that Ms. Arline was dismissed because of her "susceptibility" to tuberculosis. Arline v. School Board of Nassau County, 772 F.2d 759, 760 (11th Cir. 1985). Her dismissal arose out of the fact that "despite appellee's cooperation in a vigorous anti-tuberculosis program since 1977, she had positive tuberculosis cultures" three times in two years and public health officials informed the board that she posed an unacceptable risk of infection to children in her classroom. School Board of Nassau County v. Arline, 408 So.2d 706 (D.Ct. App. Fla 1982).

Amicus disagrees with the analysis of both courts. Undoubtedly, Congress did not intend to prohibit employers from taking into account the level of infectiousness of an employee's disease, in making a decision whether to hire a job applicant or retain an employee. However, one need not redefine "handicapped individual" in order to reach that result.

It is the position of amicus that Ms. Arline is a "handicapped individual" under the broad definition in Section 504 which includes persons with disabilities resulting from tuberculosis. However, the level of infectiousness of her disease at the time Ms. Arline was removed from her position, prevented her from being "otherwise qualified" for her position as elementary-school teacher. Thus, the school board's action in terminating her

employment was not discrimination on the basis of handicap. The school board's action was taken because of Ms. Arline's failure to meet the reasonable job-related requirements of her employer.

Two questions must be answered in determining whether an employer has discriminated on the basis of handicap. The answer to the first - whether a person has a "physical or mental impairment which substantially limits one or more of such person's major life activities" (or a record of such an impairment or is perceived as having such an impairment) - determines whether the plaintiff meets the definition of "handicapped individual" under Section 504. The answer to the second question - whether the person is "qualified" for the job in spite of the handicap - determines whether any adverse

action taken by the employer constitutes illegal discrimination against the person.

The district court built its analysis on the proposition that a person who has a disease infectious to others in a classroom situation is not "handicapped" under the definition in Section 504.

However, rather than holding these persons not to be handicapped, the same result is more appropriately reached by interpreting "otherwise qualified" to exclude handicapped persons who are capable of infecting others.

A unique analysis recently developed by the Office of Legal Counsel, Department of Justice raises another question: whether "communicability" is a "handicap." On June 23, 1986 the Department issued a Memorandum for Ronald E. Robertson, General Counsel for the Department of

Health and Human Services on the subject of the Application of Section 504 of the Rehabilitation Act to Persons with AIDS, AIDS-Related Complex, or Infection with the AIDS Virus. That memorandum opines that a person with "full-blown AIDS" is "handicapped" within the definition of Section 504, but a person who is a "carrier" of the disease is not "handicapped" solely because he/she is a "carrier."

Rather than treating the person's "communicability" or "infectiousness" as a characteristic which may legally be taken into account by an employer in determining whether the person is "otherwise qualified" the Department of Justice, in guiding federal civil rights investigators, rules that an employer is not discriminating on the basis of

handicap, when the employer takes adverse action against an employee because of a fear of the employee's contagiousness - whether or not the fears are justified.

Under this analysis, the school board's actions in the instant case would clearly be upheld because the board initially hired Ms. Arline knowing she had a history of tuberculosis and took action to terminate her status only when they discovered she was contagious. Whether the Court accepts the Justice Department's interpretation, and rules that "contagiousness" is not a handicap, or merely rules that contagiousness may be taken into account in determining whether a handicapped person is "otherwise qualified," it is clear that the school district did not discriminate on the basis of handicap in violation of Section 504.

### III. INFECTIOUSNESS OF THE EMPLOYEE'S DISEASE IS A LEGITIMATE JOB DISQUALIFICATION.

- A. An employer may consider an individual's physical health in determining whether the person is qualified for a position.

Once deciding that a person with tuberculosis is "handicapped", the court must then determine whether the person is "otherwise qualified" for the position for which she or he is applying or in which she or he is seeking retention.

All but two states require teaching certificates and use them to determine "qualification" with regard to subject-matter training and experience. A state or school board may include a variety of additional qualifications in a position description for a teacher, which are not related to subject-matter training

and experience. These might include citizenship; Ambach v. Norwick, 441 U.S. 68 (1979); residency in the school district, McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645 (1976); good character or at least no evidence of immorality which would adversely affect the teacher's ability to be an appropriate role model for young children; and freedom from mental or physical disease which could adversely affect the person's ability to perform the job.

The requirement of good health is no less a "qualification" for the position of teacher than is a teaching certificate, because the requirement directly affects the ability of the person to perform a very important function in the classroom - to assure the health and safety of the students within his/her charge.



The lower court takes the view that because Ms. Arline's handicapping condition does not relate to her academic qualifications for the job, that condition cannot be taken into account in determining whether she is "otherwise qualified" for the position. The error of this rationale is clear. Certainly no one would seriously disagree that a teacher, who intentionally assaults and batters her students, is unqualified for the position. Similarly, a teacher who transmits a serious disease to her students lacks a crucial job qualification.

This Court has recognized that a recipient of federal funds is justified in taking the health of an applicant into account in determining whether the person is "otherwise qualified." In Southeastern Community College v. Davis, 442 U.S. 403

(1979), this Court upheld a college's right to take physical limitations into account in determining "qualification" for admission to the college's nursing school:

"Taken literally, [the court of appeals'] holding would prevent an institution from taking into account any limitation resulting from the handicap, however disabling. It assumes, in effect, that a person need not meet legitimate physical requirements in order to be 'otherwise qualified.'...An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." Id. at page 406.

Regulatory provisions under the Rehabilitation Act also provide support for an employer's considering a person's physical condition in making employment decisions.

The pre-employment section of the Department of Education regulation authorizes employers to condition

employment on the results of a medical examination. 34 C.F.R. section 104.14(c). Likewise, the Department of Labor regulations under section 503 allow federal contractors to apply physical or mental job qualification requirements in the selection of applicants for jobs or in making other changes in employment status such as promotion, demotion or training. The regulation recognizes that such requirements may "tend to screen out qualified handicapped individuals" but nonetheless permits contractors to use them so long as the requirements can be shown to be job related and "consistent with business necessity and safe performance of the job." Under the regulation contractors may also require comprehensive medical examinations prior

to employment. 41 C.F.R. section 60-741.6(c).

Analogous to employees with contagious diseases are employees who are drug or alcohol abusers. In its discussion of drug and alcohol abusers in its Section 504 regulation, the Department of Health, Education and Welfare's takes the position that an employer may take into account the fact that, because of his or her handicap, an employee poses a danger to others.

"The fact that drug addiction and alcoholism may be handicaps does not mean that these conditions must be ignored in determining whether an individual is qualified for services or employment opportunities. On the contrary, a recipient may hold a drug addict or alcoholic to the same standard of performance and behavior to which it holds others, even if any unsatisfactory performance or behavior is related to the person's drug addiction or alcoholism. In other words, while an alcoholic or drug



addict may not be denied services or disqualified from employment solely because of his or her condition, the behavioral manifestations of the condition may be taken into account in determining whether he or she is qualified.

With respect to the employment of a drug addict or alcoholic, if it can be shown that the addiction or alcoholism prevents successful performance of the job, the person need not be provided the employment opportunity in question. For example, in making employment decisions, a recipient may judge addicts and alcoholics on the same basis it judges all other applicants and employees. Thus, a recipient may consider - for all applicants including drug addicts and alcoholics - past personnel records, absenteeism, disruptive, abusive, or dangerous behavior...." 34 C.F.R. section 104, App. A, subpart A, section 4.

The Congress apparently agreed with HEW that drug and alcohol abusers should not be protected by the law to the extent their disability affects job performance.

After the regulation was published, the Congress amended the definition of "handicapped individual" to exclude drug and alcohol abusers "whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others." 29 U.S.C. section 706(7)(B).

**B. An employer may consider whether a person's disease will endanger others in determining whether the person is qualified for the position.**

The Department also has taken the position that characteristics or symptoms of diseases which may endanger others in the workplace, may be taken into account in determining whether a person is qualified for the position. For example,

in Appendix A to the Section 504 regulation in its discussion of pre-employment inquiries, the Department states:

"[E]mployers may make inquiries about an applicant's ability to perform a job safely. Thus, an employer may not ask if an applicant is an epileptic but may ask whether the person can perform a particular job without endangering other employees." 34 C.F.R. 104, App. A, Subpart B, Section 18.

The Equal Employment Opportunity Commission also demonstrated concern for the health and safety of other employees in the regulations it promulgated under section 501 of the Rehabilitation Act which governs employment practices of the federal government with regard to handicapped individuals. The definition of a "qualified handicapped person" for purposes of this statutory provision

specifically states that in order to be qualified a handicapped individual must be able to "perform the essential functions of the position in question without endangering the health and safety of the individual or others...." 29 C.F.R. section 16134.702(f).

Because of the infectious nature of tuberculosis, an individual with the disease may not be able to perform his or her job without endangering the health of others in the workplace.

Tuberculosis is an "airborne" disease, spread by a germ called the "tubercle bacillus." Persons catch the disease by inhaling the bacilli suspended in droplets of moisture in the air from an infected person's cough or sneeze. Infected persons often do not develop the disease because their immune system

prevents the bacilli from multiplying. In a small proportion of people (about 5%), the germs immediately take hold and multiply. The infection can last for life and symptoms of the disease show up later in life in an additional 5% of infected persons. Infection from years earlier may progress to disease during periods of stress caused by other illnesses or physical or emotional hardship, but often for no apparent reason.

The greatest danger to persons in contact with an infectious "carrier" is the long-term threat of tuberculous infection. Perhaps because young children, i.e. those less than 5 years of age, have a less well developed immune system, they are more susceptible to developing tuberculosis than are older children and adults. Tuberculosis,

Department of Health, Education and Welfare, Public Health Service/Center for Disease Control.

However, given the same duration and intensity of exposure, there is no evidence that young children are at greater risk of acquiring infection. Older children in a classroom situation and other teachers or employees would be expected to have the same risk of becoming infected in Ms. Arline's school as the elementary age children, if they had been exposed for the same length of time in the same classroom. The school district should be concerned that students and co-workers are not subjected to tuberculosis infection, even though the infection may never bloom into the disease itself, or may occur after the person has left the school district.

Petitioners in the Reply Argument note that persons with other communicable disease such as AIDS, would be subject to the precedent set in this case. That is true. However, AIDS is a very different disease from tuberculosis. Although far more serious in consequence (over 55% of reported cases have died), AIDS is relatively difficult to catch. It is a blood-borne disease spread by intimate sexual contact or injection into the blood stream, and not by casual contact in the classroom situation. Therefore, although AIDS is a "communicable" disease, the near impossibility of casual transmission makes it likely that a teacher with AIDS would be considered "otherwise qualified" to teach young children.

In any case, the determination of whether the person is "otherwise

qualified" for the position should be determined by the school district, based upon the medical advice of public health officials.

**IV. COURTS AND LAWMAKERS RECOGNIZE LIMITATIONS ON THE ADMISSION TO PUBLIC SCHOOLS OF STUDENTS AND EMPLOYEES WITH COMMUNICABLE DISEASES.**

**A. State laws regulate the presence of persons with communicable diseases in the public schools.**

In deciding whether to hire or retain a teacher with a communicable disease, school district officials must also take into account state communicable disease statutes.

Virtually every state in the country regulates those with "communicable diseases." The statutes designate certain diseases which may require isolation of "carriers", see e.g., N.Y. Public Health Law § 225(5)(h)(2); or



require doctors to report to public health officials instances of certain diseases, see, e.g., Ariz. Rev. Stat. Ann. §§ 36.621 et seq.; D.C. Code Ann. § 6-119.

Nearly all the states have also enacted laws directly related to the health of school children. All states except two require immunization of public school students. E.g., Mont. Rev. Codes Ann. § 40-5-408; Or. Rev. Stat. § 433.267; Va. Code § 22.1-270. See Appendix. According to a recent study by the Education Commission of the States, 46 states exclude pupils from regular school attendance because of illness. At least 34 of these states specifically mention the presence of a contagious disease as a basis for excluding students from the regular school system. See Appendix. These health laws are enforced

notwithstanding compulsory attendance laws which are in effect in all the states.

The wording of the statutes varies from state to state. Indiana, for example, requires the board of health to certify that a person with a communicable disease is no longer infectious to others. Other statutes, such as that in Virginia, do not discuss "infectiousness" but merely prohibit school officials from admitting to school persons with diseases which have been declared by the state to be communicable.

Among the states with statutes regarding the health of school employees, a continuing requirement for certification of good health and freedom from disease is commonplace. Valente, Education Law Public and Private, 234 (1985). Generally this type of provision has been upheld by

the courts. King-Smith v. Aaron, 455 F.2d 378 (3rd Cir. 1975); Board of Trustees v. Porini, 263 Cal. App.2d 784 (1968).

At least 25 of the states and the District of Columbia require a medical certification that an employee is free from tuberculosis or other communicable disease. E.g., Alaska Stat. § 18.15.145; Cal. Educ. Code §§ 44839, 49406; Me. Rev. Stat. Ann. tit. 20A, § 6551; Mass. Gen. Laws Ann. Ch. 71, § 55A; N.M. Stat. Ann. § 22-10-10; Pa. Stat. Ann. tit. 24, § 12-1209. See Appendix.

Another five states do not specifically require certification that the employee is free from communicable diseases but do make good physical health a condition of employment. Conn. Gen. Stat. Ann. § 10-207; Mont. Rev. Code Ann. §20-4-106(b); Neb. Rev. Stat. §79-1247.06;

Nev. Rev. Stat. § 391.312(f); Utah Code Ann. § 53-2-25; . Approximately 20 states require employees to undergo examinations subsequent to initial employment either periodically or as ordered by the school board. Most states that require subsequent physical examinations do so on an "as needed" rather than periodic basis. However, certain states still require periodic check ups for their high risk employees, e.g., Ark. Stat. Ann. § 80-1210; Me. Rev. Stat. Ann. tit. 20A, § 6551; and some require periodic exams for all their employees. E.g., Cal. Educ. Code § 493406; W.Va. Code § 16-3-4a. In addition, nine states provide that no teacher can be employed while in the contagious stage of tuberculosis.

**B. Courts consider infectivity of the disease in Section 504 cases involving students with communicable diseases.**

Several cases address the issue of the applicability of Section 504 to students with communicable diseases. New York State Assn. for Retarded Children, Inc. v. Carey, 466 F. Supp. 479 (E.D.N.Y. 1978), involved the question of whether school officials violated Section 504 by isolating from the rest of the school community retarded children who were carriers of the hepatitis B virus. The court noted that the school board should not be required to "clearly demonstrate existence of a significant health risk," but in this case there was no showing that the carriers posed a health risk to others, because the disease is "transmitted primarily by blood-to-blood contact, by means of transfusion of

injected blood...and may also be transmitted through body fluids other than blood, such as saliva or semen." Id at page 489, n.1.

Other court decisions have upheld school officials' decisions refusing to admit students with hepatitis, based on the transmissibility of the disease in the particular individual. In an unreported decision out of the U.S. District Court of Maryland, Ely v. Howard County Board of Education, 3 E.H.L.R. 553:288 (D. Md. 1982), the court upheld the emergency suspension and ultimate exclusion from a special school for the handicapped of a retarded student with severe learning disabilities who had been identified as a carrier of the hepatitis B virus.

In that case experts testified that the child drooled constantly and that,



because saliva carries the virus, there existed a "high risk" of infection through contact of other students or staff with the child's saliva. Other evidence also showed that a member of the school staff had contracted hepatitis, apparently from this child.

The court acknowledged the right of the child to an education "in the least restrictive environment" and the hardship and injury he would suffer by being excluded from school. But it contrasted the child's hardship with the hardship that would be suffered by the board of education (representing other students and school staff) if the child were placed in school, and concluded that the two "are of a different degree and kind."

"The former is undoubtedly a temporary setback to the child in his

tragic circumstances," the court wrote. "The latter could be life threatening at the worst, and life debilitating if not life threatening."

The court then continued with a discussion of the question of "risk"--a question which always is present in these cases.

While it may well be that the hygienic precautions, if rigorously followed, would reduce the risk to a minimal one, the defendant's expert believed that the risk was nevertheless significant.

After hearing the evidence the court concludes that the risk is significant to the health and safety of the staff and the other students and believes the probability that [the student will infect a staff member or a student] is so great that the court cannot, in good conscience, say that the risk to the defendants would not outweigh the injury to the plaintiff.

It should also be emphasized that,

unlike hepatitis B, AIDS and other diseases which have been the subject of recent cases involving students, tuberculosis is highly infectious in so-called "casual" settings such as the classroom. The lower court in the instant case recognized that fact.

In each case, of course the most difficult question will be that posed to the medical experts: whether the disease in the affected individual is reasonably capable of being spread to others in the context of the school environment and, if so, how long the student or employee must be kept out of the classroom. The burden should always be placed on the handicapped individual to prove lack of infectiousness.

**V. REASONABLE ACCOMMODATION, IF AUTHORIZED AT ALL BY SECTION 504, DOES NOT REQUIRE AN EMPLOYER TO PLACE IN ANOTHER POSITION, A PERSON UNQUALIFIED FOR HIS/HER CURRENT POSITION.**

The most disturbing part of the court of appeals decision is its directive to the district court to determine first, if Ms Arline is "otherwise qualified" for her present job and, if not, what other jobs the school district could devise for which she would be qualified. This elevates the "reasonable accommodation" requirement from a means of making minor adjustments to qualify the person for the current position, to a separate requirement that the employer make affirmative efforts to create a position for the handicapped person when he or she is not qualified for the position for which he or she is being considered.

The statutory language of section 504

contains no requirement that employers provide "reasonable accommodation" for the handicapping condition of an employee or applicant. However, the Department regulation, promulgated under Section 504, does contain such a requirement.

The Department of Health, Education and Welfare (now the Department of Education and Department of Health and Human Services) took its "reasonable accommodation" requirement from a similar requirement in the Department of Labor regulation under section 503 of the Rehabilitation Act of 1973 (applies to federal contractors). HEW noted, in Appendix A to its regulation, that: "Although the wording of the reasonable accommodation provisions of the two regulations is not identical, the obligation that the two regulations impose

is the same, and the federal government's policy in implementing the two sections will be uniform." 34 C.F.R. 104, Appendix A, Subpart B, Section 16.

As this Court has noted "an agency's interpretation of the statute under which it operates is entitled to some deference, [however] 'this deference is constrained by our obligation to honor the clear meaning of a statute as revealed by its language, purpose and history.'" (citation omitted) Southeastern Community College v. Davis, 442 U.S. 403, 411. A serious question arises as to whether Section 504 authorizes inclusion of a "reasonable accommodation" provision in the regulation. First, as this Court has noted, the statute does not authorize any regulation under Section 504, except as to employees and contractors of the federal government.

Id at page 413, n. 11. Second, even if authorization could be implied, the authorization would not extend to encompass affirmative requirements such as that mandated by the lower court.

In addition to the explicit authorization in Section 503 for a government regulation implementing the provisions of the law, another important distinction between Section 503 and Section 504 lays in question the validity of the Department of Education's "reasonable accommodation" requirement. Unlike Section 504, which prohibits discrimination, Section 503 requires government contractors to "take affirmative action to employ and advance in employment qualified handicapped individuals....", 29 U.S.C 793(a). Thus, while a requirement relating to

"reasonable accommodation" under Section 503, would be appropriate in order to implement the Congressional intent relating to "affirmative action", such a requirement may not be appropriate under a non-discrimination statute such as Section 504.

As this Court pointed out in Southeastern Community College v. Davis, supra at 411, "a comparison of [sections 501, governing Federal Government employment, 503 and 504] demonstrates that Congress understood accommodation of the needs of handicapped individuals may require affirmative action and knew how to provide for it in those instances where it wished to do so."

If, indeed, the Department of Health, Education and Welfare is held to have had the authority to adopt a "reasonable



accommodation" requirement, that authorization could only extend as far as a means of meeting Section 504's non-discrimination requirement. There is no authority in the law which supports a department regulation making an affirmative obligation to "find a job" somewhere in the employer's organization for a handicapped person.

Like the court of appeals below, we sympathize with Ms. Arline and the situation she finds herself in through no fault of her own. But, Section 504 is a non-discrimination act, not a law guaranteeing employment to handicapped persons. No where in the Act or in the regulation is there a requirement that the employer either create a job for the handicapped person, which meets the person's qualifications, or place the

person in a different job than that for which they have applied or have held in the past.

Section 104.12(b) of the Department of Education regulation provides examples of methods of accommodation which the Department believed would be "reasonable." All of the examples refer to restructuring the qualification requirements of the job for which the handicapped employee is being considered, providing equipment to assist the employee in qualifying for the job or making the employer's facilities accessible to the job applicant. No where is there any indication that the Department intended to require the employer to consider the person for a different job, in the event accommodation cannot be made in the first job.

"(b) Reasonable accommodation may include: (1) making

facilities used by employees readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions."

The appendix to the regulation provides additional guidance as to the department's definition of "reasonable accommodation."

"Job restructuring may entail shifting nonessential duties to other employees. In other cases, reasonable accommodation may include physical modifications or relocation of particular offices or jobs so that they are in facilities or parts of facilities that are accessible to and usable by handicapped persons." 34 C.F.R. 104, App. A, Subpart B, Section 16.

Even the Department of Labor regulation 41 C.F.R. 60-741, implementing Section 503, which as we have said

requires "affirmative action," does not carry the definition of "reasonable accommodation" as far as the lower court. The regulation provides in part, as follows:

"'Qualified handicapped individual' means a handicapped individual as defined in section 60-741-2 who is capable of performing a particular job with reasonable accommodation to his or her handicap."

Significantly, the accommodation requirement applies only to a "particular job." The implementing regulations of Section 501 of the Rehabilitation Act includes a similar qualifier on the scope of the "reasonable accommodation" requirement; this restriction appears even though section 501, like Section 503, contains an affirmative action requirement. Under Section 501, the regulation regarding the definition of

"qualified handicapped person" provides as follows:

"Qualified handicapped person means with respect to employment, a handicapped person who, with or without reasonable accommodation can perform the essential functions of the position in question without endangering the health and safety of the individual or others...." 29 C.F.R. section 16134.702(f).

The key phrase to note in this definition restricts application of the accommodation requirement to the "position in question."

Thus, it is apparent that neither the Department of Labor nor the Department of Health, Education and Welfare intended by their "reasonable accommodation" requirements to mandate that handicapped employees who are not qualified for the position be provided a different one. In the instant case, the "particular job" is the position which Ms. Arline held as an

elementary-school teacher. Since her disability renders her unqualified for the position of elementary-school teacher, the school district was authorized to terminate her employment.

#### **VI. ALLOWING A PERSON WITH A CONTAGIOUS DISEASE TO REMAIN IN THE CLASSROOM SUBJECTS A SCHOOL DISTRICT TO POTENTIAL TORT LIABILITY**

In each case where a school district knowingly allows a student or employee with a contagious disease to remain in the classroom, there exists the potential of a suit in tort by another who contracts the disease from the infected person.

A number of such cases arose at a time when diseases such as tuberculosis and smallpox were far more prevalent in this country. These cases hold employers or landlords liable to persons who have contracted diseases from others on the premises. The courts have held that the



defendant knew or should have known of the danger and had a duty to warn others of that danger. See, e.g., Earle v. Kuklo, 98 A.2d 1097 (N.H. App. Div., 1953); Kleigel v. Aitken, 69 N.W. 67 (Wisc. 1896); Gilbert v. Hoffman, 23 N.W. 632 (Iowa 1885).

Employers have even been held to be negligent for failure to take prophylactic measures to clean up the premises after removing an infected person from the premises. For example, a case in Minnesota involved a school teacher who alleged that she contracted tuberculosis because the school district had not properly cleaned and disinfected the classroom after the teacher's predecessor left her job due to tuberculosis. Although dismissing the action because of the school district's immunity, the court

held that the school district had been negligent. Bang v. Independent School District No. 27, 225 N.W. 499 (1929).

### CONCLUSION

Amicus submits that Ms. Arline is "handicapped" under Section 504 of the Rehabilitation Act of 1973. The school district, as an important part of its duty to protect the students within its charge, requires that teachers must be physically capable of doing the job. The uncontroverted medical testimony here indicated that Ms. Arline was capable of transmitting her tuberculosis infection to the students in the context of the classroom. Since she cannot meet a valid criterion for her position, she is not "otherwise qualified" for the job.

The court of appeals remanded the case back to the district court for a

determination as to whether the school district could "reasonably accommodate" Ms. Arline's lack of qualification for elementary-school teacher, by finding another job in the district for her that would not require contact with young children.

Even assuming that Ms. Arline is not infectious to older individuals - a contention not supported by the record - that does not authorize a court to direct the school district to find other employment for Ms. Arline.

Section 504 is a non-discrimination statute. If the district does not have a practice of moving employees from position to position, when they are not qualified for the position which they hold or for which they apply, it is not discriminatory to hold Ms. Arline to the same standard.

The "reasonable accommodation" requirement, if valid at all, is valid only to the limited extent of making minor accommodations for the handicap. Even under Section 503, which requires affirmative action, a requirement to create a position for a handicapped person would be unauthorized by the law.

Under modern therapy, if avidly followed by the patient, most persons who contract tuberculosis can be completely cured of the disease. Others with drug-resistant organisms may continue to be infectious. Infectiousness of Tuberculosis, American Review of Respiratory Disease, Vol. 96, No. 4, October 1967. Ms. Arline may be one of those persons. However, it is beyond the scope of the law and of good public policy to place the school district in the

position of either risking the health of the students in Ms. Arline's classroom by allowing her to remain in her present position or, on the other hand, to create a position for her elsewhere in the district.

Respectfully submitted,

Gwendolyn H. Gregory  
**Counsel of Record**  
 Deputy General Counsel  
 National School Boards Association  
 1680 Duke Street  
 Alexandria, VA  
 (703) 838-6722

August W. Steinhilber  
 NSBA General Counsel/Associate Executive  
 Director

Thomas A. Shannon  
 NSBA Executive Director

# APPENDIX

## STATUTORY REQUIREMENTS ON SCHOOL HEALTH

	Pupils			Teachers*	
	PHYSICAL EXAM.	IMMUNIZATION	FREE FROM COMM. DISEASE	FREE FROM TUBERCULOSIS	FREE FROM COMM. DISEASE
AL	X	X	X		
AK	X	X <sub>1</sub>	X	X <sub>4</sub>	
AZ		X	X	X <sub>4,5</sub>	
AR		X	X	X <sub>4</sub>	X
CA	X	X <sub>1</sub>	X	X <sub>3,4</sub>	X
CO		X	X		
CT	X	X	X		
DE			X		
DC		X	X <sub>2</sub>		X <sub>2</sub>
FL	X	X			
GA		X			

Pupils				Teachers*	
State	PE	IM	CD	TB	CD
HI	X	X			
ID		X		X <sub>3,4,5</sub>	X
IL	X	X		X <sub>4</sub>	X
IN	X	X			
IA			X		
KS	X	X		X <sub>4</sub>	X
KY	X	X	X		
LA	X	X	X		
ME		X	X	X <sub>4</sub>	
MD		X <sub>1</sub>	X	X <sub>4,5</sub>	
MA	X	X	X	X <sub>4,5</sub>	
MI	X	X			
MN		X		X <sub>5</sub>	X
MS		X	X	X <sub>4,5</sub>	X
MO	X	X	X		
MT		X	X		
NE	X	X	X		
NV	X	X	X		

Pupils				Teachers*	
State	PE	IM	CD	TB	CD
NH	X	X	X		
NJ	X	X	X		
NM		X			X <sub>5</sub>
NY	X	X	X		
NC		X	X	X <sub>4</sub>	X
ND	X	X	X		
OH	X	X	X		
OK	X	X	X		
OR		X	X		X <sub>5</sub>
PA	X	X	X	X <sub>3</sub>	X
RI	X	X			
SC		X	X	X <sub>4</sub>	
SD	X	X	X	X <sub>4</sub>	X
TN		X			X <sub>4,5</sub>
TX	X	X		X <sub>4</sub>	
UT	X	X		X	
VT	X	X			
VA		X		X <sub>4</sub>	



State	Pupils			Teachers*	
	PE	IM	CD	TB	CD
WA		X	X		X
WV	X	X	X	X <sub>4</sub>	
WI		X	X	X <sub>4</sub>	
WY		X	X		
<b>Total:</b>	<b>29</b>	<b>49</b>	<b>35</b>	<b>21</b>	<b>15</b>

- 1 Discretionary with school district
- 2 General public health statute
- 3 Teacher certification prerequisite
- 4 Additional tests or exams required on a periodic basis or when deemed necessary
- 5 Requires exclusion from school

## TABLE OF CITATIONS

Pupils**Physical Exams**

Ala. Code §§ 16-29-1

Alaska Stat. § 14.30.070

Cal. Educ. Code §§ 49-450; 49-452.5

Conn. Gen. Stat. Ann. § 10-206

Fla. Stat. Ann. § 232.0315

Hawaii Rev. Stat. § 298-47

Ill. Ann. Stat. Ch. 122, § 27-8-1

Ind. Code Ann. § 20-8.1-7-3

Kansas Stat. Ann. § 72-5209

Ky. Rev. Stat. § 158.036

La. Rev. Stat. § 17:156

Mass. Gen. Laws Ann. ch. 71, § 57

Mich. Comp. Laws Ann. § 15.41177

Mo. Ann. Stat. § 192.070

Neb. Rev. Stat. § 79, 444

Nev. Rev. Stat. § 392.420

N.H. Rev. Stat. Ann. § 200:32

**Physical Exams**

N.J. Rev. Stat. § 18A: 40-4  
 N.Y. Educ. Law §§ 903; 904  
 N.D. Cent. Code § 15-47-22  
 Ohio Rev. Code Ann. § 3313.71  
 Okla. Stat. Ann. tit. 70, § 11-104  
 PA. Stat. Ann. tit. 24, § 14-1402  
 R.I. Gen. Laws § 16-21-9  
 S.D. Codified Laws Ann. § 13-28-5  
 Tex. Educ Code Ann. § 11.20  
 Utah Code Ann. § 53-22-2  
 Vt. Stat. Ann. tit. 16, § 1384  
 W.VA. Code § 18-5-22

**Student Immunization**

Ala. Code § 16-30-4  
 Alaska Stat. § 14.30.125  
 Ariz. Rev. Stat. Ann. § 15-803  
 Ark. Stat. Ann. § 8-1548  
 Cal. Educ. Code § 49-452.5

**Student Immunization**

Colo. Rev. Stat. § 25-4-902  
 Conn. Gen. Stat. Ann. § 10-20-4a  
 D.C. Code Ann. § 31-502  
 Fla. Stat. Ann. § 232.032  
 Ga. Code Ann. § 20-2-771  
 Hawaii Rev. Stat. § 298-42  
 Idaho Code § 39-4801  
 Ill. Ann. Stat. ch. 122, § 27-8.1  
 Ind. Code Ann. § 20-8.1-7-9.5  
 Kansas Stat. Ann. § 72-5209  
 Ky. Rev. Stat. § 158.035  
 La. Rev. Stat. Ann. § 17:170  
 Me. Rev. Stat. Ann. tit. 20A, § 6351  
 Md. Educ. Code Ann. § 7-402  
 Mass. Gen. Laws Ann. ch. 76, § 15  
 Mich. Comp. Laws Ann. § 15.41117  
 Minn. Stat. Ann. § 123.70  
 Miss. Code Ann. § 37-7-301  
 Mo. Ann. Stat. § 167.181

**Student Immunization**

Mont. Code Ann. § 40-5-403  
 Neb. Rev. Stat. § 79, 444.01  
 Nev. Rev. Stat. § 392.435  
 N.H. Rev. Stat. Ann. § 200:38  
 N.J. Rev. Stat. § 18A: 40-13/22  
 N.M. Stat. Ann. § 24-5-2  
 N.Y. Educ. Law § 2164  
 N.C. Gen. Stat. § 130A-144.152.155  
 N.D. Cent. Code § 23-07-17.1  
 Ohio Rev. Code Ann. § 3313.671  
 Okla Stat. Ann. tit. 70, § 1210.191  
 Or. Rev. Stat. § 433.267  
 PA Stat. Ann. tit. 24, § 1210.191  
 R.I. Gen. Laws § 16-38-2  
 S.C. Code Ann. § 44-29-180  
 S.D. Codified Laws Ann. § 13-28-7.1  
 Tenn. Code Ann. § 49-6-5001  
 Tex. Educ. Code Ann. § 2.09  
 Utah Code Ann. § 26-6-22

**Student Immunization**

Vt. Stat. Ann. tit. 18, § 1121  
 VA. Code § 22.1-270  
 Wash. Rev. Code Ann. § 28A-31-114  
 W.VA. Code § 16-3-4  
 Wis. Stat. Ann. § 140.05  
 Wyo. Stat. § 21-4-309

**Student Communicable Diseases**

Ala. Code § 16-29-1  
 Alaska Stat. § 14.30.045(4)  
 Ariz. Rev. Stat. Ann. § 15-803  
 Ark. Stat. Ann. § 80-1516  
 Cal. Educ. Code § 49451  
 Colo. Rev. Stat. § 22-33-106  
 Conn. Gen. Stat. Ann. § 10-210  
 Del. Code Ann. tit. 14, § 2707  
 D.C. Code Ann. § 31-502  
 Iowa Code Ann. § 282.3  
 Ky. Rev. Stat. § 158.160  
 LA. Rev. Stat. Ann. § 17:226



**Student Communicable Diseases**

ME. Rev. Stat. Ann. tit. 20A, § 6301

Md. Educ. Code Ann. § 7-30(2)

Mass. Gen. Laws Ann. ch. 71, § 55A

Miss. Code Ann. § 37-7-301

Mo. Ann. Stat. § 167.191

Mont. Code Ann. § 20-5-405

Neb. Rev. Stat. § 79-4, 177

Nev. Rev. Stat. § 439.510

N.H. Rev. Stat. Ann. § 200:39

N.J. Rev. Stat. § 18A: 40-8

N.Y. Educ Law § 906

N.C. Gen. Stat. § 130A- 17B

N.D. Cent. Code § 23-07-16

Ohio Rev. Code Ann. § 3313.55

Okla. Stat. Ann. tit. 70, § 1210.194

Or. Rev. Stat. § 433.260

PA. Stat. Ann. tit. 53, § 37306

S.C. Code Ann. § 44-29-200

S.D. Codified Laws Ann. § 13-28-7.3

**Student Communicable Diseases**

Wash. Rev. Code Ann. § 28A.31.010

W.VA. Code § 18A-5-1

Wis. Stat. Ann. § 143.12

Wyo. Stat. § 21-4-307

**Teachers****Teachers Tuberculosis**

Alaska Stat. § 18.15.145

Ariz. Rev. Stat. Ann. § 15-206

Ark. Stat. Ann. § 80-1210

Cal. Educ. Code § 49406

Idaho Code § 33-1202(3)

1973 Ill. Laws 78-344, § 2

Kansas Stat. Ann. § 72-5213

ME. Rev. Stat. Ann. tit. 20A, § 6551

MD. Educ. Code Ann. § 7-404

Mass. Gen. Laws Ann. ch 71, § 55A

Minn. Stat. Ann. § 125.04

Miss. Code Ann. § 37-11-13

N.C. Gen. Stat. § 115C-323

**Teachers Tuberculosis**

PA. Stat. Ann. tit. 24, § 12-1209  
 S.C. Code Ann. § 44-29-150  
 S.D. Codified Laws Ann. § 13-43-3.1  
 Tex. Rev. Civ. Stat. Ann. art. 4477-12  
 Utah Code Ann. § 26-6-9  
 VA. Code § 22.1-300  
 W.VA. Code § 16-3-4a  
 Wis. Stat. Ann. § 143.16, 143.17

**Teachers Communicable Diseases**

Ark. Stat. Ann. § 80-1210  
 Cal. Educ. Code § 44839  
 D.C. Code Ann. § 6-119  
 Idaho Code § 33-1202(3)  
 1973 Ill. Laws 78-344, § 2  
 Kansas Stat. Ann. § 72-5213  
 Minn. Stat. Ann. § 125.17(4)  
 Miss. Code Ann. § 37-11-17  
 N.M. Stat. Ann. § 22-10-10

**Teachers Communicable Diseases**

N.C. Gen. Stat. § 115C-323  
 Or. Rev. Stat. § 433.255  
 PA. Stat. Ann. tit. 24, § 12-1209  
 S.D. Codified Laws Ann. § 13-43-3  
 Tenn. Code Ann. § 49-1302  
 Wash. Rev. Code Ann. § 28A.31.010